



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

March 3, 2000

00-CORR-025

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: DoD Policy Concerning Release of Unit Prices under the FOIA

A number of questions have been raised within the Department of Defense (DoD) concerning the decision of the Court of Appeals in the case of McDonnell Douglas Corp. v. NASA, 180 F3d 303 (D.C Cir 1999). Specifically, these questions concern whether DoD has changed its policy on release of unit prices within Government contracts. The Department of Justice (DOJ) held a meeting addressing these concerns on February 24, 2000, and distributed the attached issue paper. This memorandum addresses DoD policy in light of the results of that meeting.

The attached OASD (PA) memorandum dated February 8, 1998 reflects DoD policy regarding the release of unit prices in solicitations for contracts issued on or after January 1, 1998. This policy, based on a change to the Federal Acquisition Regulation (FAR), Part 15, states that unit prices in contracts solicited on or after January 1, 1998 will be released with no submitter notification required. The McDonnell Douglas decision has no affect on the change to the FAR, and the release of unit price information in contracts solicited on or after January 1, 1998. DoD policy has not changed as a result of this decision.

For contracts solicited prior to January 1, 1998, the procedures set forth in Section C5.2.8.1 of DoD 5400.7-R, "DOD Freedom of Information Act Program," will be followed. Submitter notice will be given to contractors advising them of the intent to release unit prices, and giving them the opportunity to state their concerns. In accordance with Section C5.2.8.1 of DoD 5400.7-R, objections to release of unit prices will be evaluated, and the final decision to disclose information claimed to be exempt will be made by the DoD component. If the DoD component disagrees with the submitter and decides to release unit prices, the submitter will be informed of the intention to release the information, and given enough time initiate a reverse FOIA lawsuit. The McDonnell Douglas decision relies on its specific facts and does not establish a new legal requirement limiting disclosure.



The attached DOJ issue paper offers guidance on how to respond to submitter claims that the McDonnell Douglas decision sets a precedent for the withholding of unit prices in contracts not subject to the revised FAR, Part 15. Specifically, these arguments concern potential competitors underbidding in future contracts, and commercial customers "ratcheting down" the submitter's prices. Regarding the argument that release of unit prices would permit underbidding, DoD components should rely, in appropriate cases, on the analysis adopted by the court in Acumenics Research & Tech., Inc. v. United States Department of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (reverse FOIA suit), and Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit). These cases upheld agency determinations that no underbidding harm is caused by release of unit prices. The assertion that release of unit prices would allow customers to "ratchet down" or cause prices to fall because of consumer knowledge of the submitter's price to the government also has precedent cases countering the concept. DoD components should rely, in appropriate cases, on Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) and CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) to demonstrate that competitive harm, as encompassed by exemption 4, is limited to harm flowing from the affirmative use of proprietary information by competitors only, and does not include harm to commercial customers, consumers, or some other general economic harm.

Components are reminded that provisions have been made for withholding unit prices prior to the awarding of a contract, and for withholding unit prices contained in unsuccessful proposals. As stated within the attached OASD (PA) memorandum dated February 8, 1998, unit prices are withheld prior to contract award in accordance with 41 USC 423, Procurement Integrity Act, and unit prices within unsuccessful proposals are protected from disclosure pursuant to 10 USC § 2305(g).

Request widest dissemination possible.


H.G. McIntyre
Director

Attachments:

U.S. Department of Justice Memorandum, February 24, 2000, "Unit Price FOIA Officers Conference"

OASD (PA) Memorandum, February 8, 1998, "Release of Unit Prices in Awarded Contracts," with Attachments



PUBLIC AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400



FEB 08 1998

Ref: 97-CORR-136

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Release of **Unit Prices** in Awarded Contracts

The attached extract from the Federal Register indicates that after award of a contract, the government must provide to unsuccessful bidders certain information concerning the successful bidder and the contract. This information includes **unit prices**, among other items, contained in each award. The reference from the Federal Register is a change to the Federal Acquisition Regulation (FAR), Part 15. This change to the FAR is not a change to DoD Freedom of Information Act (FOIA) policy.

This change to the FAR removes any potential confusion about **unit prices**; they are **not** proprietary information after contract award, and accordingly cannot be withheld from disclosure under the FOIA by exemption (b)(4). Concerning FOIA requests for contracts awarded on solicitations issued on or after January 1, 1998, submitter notification **is not** required for the release of unit prices or other items indicated in the change to the FAR. However, submitters should still be notified concerning this information contained in contracts awarded on solicitations issued prior to January 1, 1998, and for other submitter information contained in all contracts. Also, please remember that **prior** to contract award, **unit prices** shall be withheld under 41 USC 423, Procurement Integrity Act. Additionally, after contract award **unit prices** contained in unsuccessful proposals shall be protected along with the proposal from disclosure pursuant to 10 USC § 2305(g).

Also attached for your information is a copy of Department of Justice guidance regarding this matter. Please pass this information on to your components.

A. H. Passarella
Director
Freedom of Information
and Security Review

Attachments:
As stated





U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

February 24, 2000

Unit Price FOIA Officers Conference

Issue: Dealing with requests for unit prices after McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999).

1. As a reverse FOIA case, decided under the APA, McDonnell Douglas is necessarily a "case-specific, record-specific" case; the decision does not set forth a new rule of law or categorical nondisclosure principle. (The denial of rehearing further supports this.)

2. Although the Solicitor General decided against seeking certiorari, he did so recognizing that this issue warrants further judicial review in a future case in which the government could expect a better outcome with another panel.

3. The only way in which this issue can be preserved for future appellate review is for agencies to consistently hold to the position of disclosing unit prices upon a determination that their release would not cause competitive harm.

4. Accordingly, agencies must take special care in compiling their administrative records and be sure to restate, carefully evaluate, and address all submitter objections to disclosure.

5. The reasoning that agencies should use is as follows:

a. For all contracts subject to the revised FAR Part 15, agencies should rely on the FAR as mandatory authority to disclose unit prices. In such cases, in accordance with the FAR, no submitter notice ordinarily is given in the first place.

b. For any contracts not subject to the revised FAR provision, agencies should deal with a submitter's reliance upon McDonnell Douglas as follows:

i. Issue 1 (competitors underbidding): Agencies should analyze this argument as they have always done, looking to see whether in fact it is likely that a competitor could ascertain from the unit prices any proprietary information (such as profit, or actual costs, etc.) that would permit underbidding. Agencies can rely on the reasoning and precedent of the Fourth and Ninth Circuits in Acumenics and Pacific Architects, which upheld agency determinations that no underbidding harm is

possible based on release of unit prices. By contrast, the McDonnell Douglas decision contains no analysis of this issue whatsoever; rather, it simply rejects NASA's response out of hand.

ii. Issue 2 (customers "ratcheting down"):
Although appellate law on this issue is sparse, there is a clear conflict within the D.C. Circuit on it. Both Public Citizen and CNA emphasized that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors." McDonnell Douglas did not overrule or reject these holdings, it simply ignored them. Indeed, courts previously interpreting this prong of National Parks have articulated the standard as whether disclosure is likely to cause substantial competitive harm, as opposed to any other sort of economic harm. Agencies faced with this argument should reject it based on the uniform judicial articulation of this standard (prior to McDonnell Douglas), as it has been specifically applied in Public Citizen and CNA.

(7) Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead). Also show how the costs would be allocated to the units at their various stages of contract completion.

(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date.

(10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date. When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which your proposal relates.

(11) Enter total incurred costs (Total of Columns (8), (9), and (10)).

(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates.

(13) Enter total estimated cost (Total of Columns (11) and (12)).

(14) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

Subpart 15.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

15.501 Definition.

Day, as used in this subpart, has the meaning set forth at 33.101.

15.502 Applicability.

This subpart applies to competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). The procedures in 15.504, 15.506, 15.507, 15.508, and 15.509, with reasonable modification, should be followed for sole source acquisitions and acquisitions described in 6.102(d)(1) and (2).

15.503 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range*. The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

(2) *Preaward notices for small business set-asides*. In addition to the notice in paragraph (a)(1) of this section, when using a small business set-aside (see subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that

(i) The Government will not consider subsequent revisions of the offeror's proposal; and

(ii) No response is required unless a basis exists to challenge the small business size status of the apparent successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay or when the contract is entered into under the 8(a) program (see 19.805-2).

(b) *Postaward notices*—(1) Within 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 2305(b)(5) and 41 U.S.C. 253b(c)) or had not been previously notified under paragraph (a) of this section. The notice shall include—

(i) The number of offerors solicited;
(ii) The number of proposals received;
(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice. However, the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request; and

(v) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) Upon request, the contracting officer shall furnish the information described in paragraph (b)(1) of this section to unsuccessful offerors in solicitations using simplified acquisition procedures in part 13.

(3) Upon request, the contracting officer shall provide the information in paragraph (b)(1) of this section to unsuccessful offerors that received a preaward notice of exclusion from the competitive range.

15.504 Award to successful offeror.

The contracting officer shall award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror.

(a) If the award document includes information that is different than the latest signed proposal, as amended by the offeror's written correspondence, both the offeror and the contracting officer shall sign the contract award.

(b) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the proposal acceptance period.

(c) If the Optional Form (OF) 307, Contract Award, Standard Form (SF) 26, Award/Contract, or SF 33, Solicitation, Offer and Award, is not used to award the contract, the first page of the award document shall contain the Government's acceptance statement from Block 15 of that form, exclusive of the Item 3 reference language, and shall contain the contracting officer's name, signature, and date. In addition, if the award document includes information



FOIA UPDATE

New Disclosure Rule Adopted for Unit Prices

After many years of contentious disputes between agencies and federal contractors over the FOIA disclosability of unit prices in awarded government contracts, the recent rewrite of Part 15 of the Federal Acquisition Regulation (FAR)—the governmentwide regulation that governs agency contracting—should soon put this issue to rest.

On September 30, after public notice and comment, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule revising Part 15 of the FAR. Critical revisions of two sections now make clear that the unit prices of each award are to be disclosed to unsuccessful offerors during the postaward notice and debriefing process and, most significantly, are also to be made publicly available upon request. 62 Fed. Reg. 51,224, 51,254, 51,255 (1997) (to be codified at 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2)).

Unit Prices Under the FOIA

Part 15 of the FAR has always contained a provision requiring agencies to disclose (with some exceptions) the unit prices of successful offerors to unsuccessful offerors during the postaward notification process for negotiated contracts. See 48 C.F.R. § 15.1003(b)(1)(iv) (1996). Because Exemption 4 protection is vitiated for information that is publicly available, the Justice Department has long advised agencies that the unit prices of successful offerors that are required to be disclosed under the FAR postaward notice process should not be considered to be within the available protection of Exemption 4. See *FOIA Update*, Fall 1984, at 4.

Nevertheless, over the years, numerous "reverse" FOIA cases have been brought by submitters who have challenged agency decisions to disclose unit prices, and agencies have been forced to litigate this issue time and again. The FAR rewrite should remedy that problem.

Major New FAR Provisions

The newly issued FAR provisions expressly require disclosure of unit prices in both the postaward notice to and debriefing of unsuccessful offerors. Although there is an exception to that requirement for the postaward notice if "the number of items or other factors makes listing any stated unit prices impracticable," the FAR now expressly limits that exception to what is required to be included in the contents of the postaward notice *itself*. 62 Fed. Reg. at 51,254. Further, an entirely new provision has been added to the FAR to specifically provide that "the items, quantities, and any stated unit prices of each award shall be made

publicly available, upon request." *Id.* Thus, even if it is impracticable to include voluminous unit prices in a postaward notice itself, once such information is requested, the agency now must make it publicly available.

In addition to these changes made to the postaward notice section, the FAR rewrite also changes the section specifying the information that is required to be disclosed during postaward debriefings of offerors. *Id.* at 51,255. The debriefing provision now explicitly provides that during a debriefing the "overall evaluated cost or price (*including unit prices*)" shall be furnished the debriefed offeror.

Thus, unsuccessful offerors (who frequently request pricing information concerning successful contractors) now will have two distinct avenues open to them to obtain unit price information as part of the contracting process itself—i.e., through the postaward notice or a postaward debriefing. Most significantly, the unsuccessful offeror (or, for that matter, any member of the public) can request such information, and the FAR directs that it shall be made "publicly available." As the D.C. Circuit Court of Appeals has recognized, "[t]o the extent that any data requested under [the] FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987).

No Submitter Notice Necessary

As a result of the FAR's new express authorization to publicly release "items, quantities, and any stated unit prices of each award" upon request, agencies will no longer have to go through the oftentimes-cumbersome process of giving submitter notice prior to disclosing unit prices in response to a FOIA request. Exec. Order No. 12,600, § 8(b). Since public disclosure of awarded unit prices will now be a mandatory part of the postaward process, successful offerors will not reasonably be able to argue that their unit prices should be withheld under the FOIA, because those prices no longer could possibly be considered "confidential."

These new FAR provisions (which were developed by OIP Senior Counsel Melanie Ann Pustay) become mandatory for contracts solicited after January 1, 1998, regarding which submitter notice will no longer be required.

This issue of *FOIA Update* contains a cumulative index covering Volumes I through XVIII of its publication, from 1979 through 1997.